

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

ROBERT L. AYERS,

Plaintiff,

v.

CIVIL ACTION NO. 2:03-2239

MARSH & MCLENNAN COMPANIES,
INC., a corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

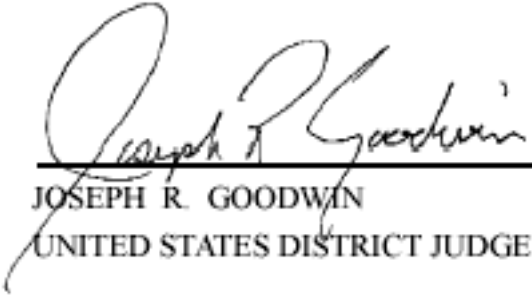
Pending before the court is the defendant's Motion to Recover Expert Fees Incurred Due to Plaintiff's Spoliation of Evidence [Docket 61]. The court previously addressed a similar motion by the defendant in an Order dated October 8, 2004. The court's October 8 Order denied the defendant's motion to dismiss the plaintiff's case as a sanction for spoliation of evidence. In pertinent part, that order stated: "None of this discussion, however, should indicate that I approve in any way of the plaintiff's alleged actions, which I have taken as true for the purposes of the Motion. I am fully inclined to consider an appropriate sanction or adverse inference instruction to the jury *if further development of the facts of this case requires such action.*" (emphasis added). Subsequent to that Order, I entered summary judgment in favor of the defendant on December 30, 2004, without any further development of the spoliation issue.

The defendant's instant motion to recover expert fees essentially renews the earlier spoliation motion but requests a different penalty. The defendant, however, overlooks the language in the October 8 Order referring to "further development of the facts of the case." The defendant has

produced no new evidence in support of the instant motion and the case has been closed. Accordingly, I **FIND** that there has been insufficient further development of the evidence of the alleged spoliation, and decline to award sanctions because they are unwarranted under the facts of this case. *See, e.g., Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (“[A] district court has broad discretion in choosing an appropriate sanction for spoliation.”). The defendant’s motion [Docket 61] is **DENIED**.

The court **DIRECTS** the Clerk to send a copy of this Written Opinion and Order to counsel of record and any unrepresented party.

ENTER: June 8, 2005



JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE